CALIFORNIA COASTAL COMMISSION: RETROACTIVITY OF A JUDICIAL RULING OF UNCONSTITUTIONALITY

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I. INTRODUCTION

In January 2003, in *Marine Forests Society v. California Coastal Commission*, the California Court of Appeals ruled that the California Coastal Commission's appointment structure violates the California state constitution's separation of powers clause.[1] The plaintiff, Marine Forests Society (MFS), had built an experimental reef on the floor of the Newport Harbor. The California Coastal Commission (hereinafter "Commission") notified the MFS that it intended to commence cease and desist proceedings against it. The MFS brought suit to enjoin the Commission, arguing that the Commission's appointment structure was unconstitutional and therefore, that the Commission did not have the authority to issue the order.[2] The appellate court agreed with the MFS. On April 9, 2003, the Supreme Court of California agreed to review this case.[3] If the California Supreme Court upholds the ruling of unconstitutionality, it will then have to decide whether such a ruling will retroactively invalidate past and pending decisions of the Commission.[4] Such a retroactive application of a ruling of unconstitutionality would cause uncertainty and disarray for cities and property owners who have relied on Commission decisions over the past twenty-seven years.

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1. Marine Forests Soc'y v. Cal. Coastal Comm'n, 104 Cal. App. 4th 1232 (2002).

2. *Id.* at 1236.

3. Supreme Court of California Docket No. S113466, *at* http://appellatecases.courtinfo.ca.gov (last visited Nov. 11, 2003).

4. *Id.* ("[T]he court requested additional briefing on the following [issue]: . . . What effect would the holding of the Court of Appeal have on past and other currently pending decisions of the California Coastal Commission?").

The doctrine of retroactivity has gone through various incarnations at both the state and the federal levels over the past two hundred years, so it is not obvious which approach the court will use in this case. In addition to having a choice of approaches to retroactivity of judicial decisions, the court could choose to use the *de facto* officer doctrine and uphold past decisions of commissioners because they were *de facto* officers at the time they made the decisions. The purpose of this Note is to navigate the case law from California courts and from the United States Supreme Court in an attempt to determine whether the California Supreme Court will make retroactive a ruling of unconstitutionality in the MFS case.

This Note will first give a brief background on the Commission and the MFS case. It will then examine the history of the retroactivity and *de facto* officer doctrines at both the United States and California Supreme Court levels. Given the existing history of retroactivity, the Note will then explore the factors that the California Supreme Court will consider in reaching a decision, and the limiting effect of *res judicata* and statutes of limitations on retroactive decisions. Finally, the Note will examine whether the court would use the *de facto* officer. This Note concludes that if the California Supreme Court upholds the ruling of unconstitutionality, it will not invoke the *de facto* officer doctrine, but will choose instead to make its decision non-retroactive.

II. BACKGROUND

A. *California Coastal Commission: History, Number and Importance of Decisions*

The California Coastal Commission was first created by voter initiative in 1972[5] and later made permanent by the California Coastal Act of 1976.[6] The Commission's duties include reviewing and certifying the programs of local governments for compliance with the Coastal Act, granting and denying permits for development, requiring property owners to offer easements for public beach access, and issuing cease and desist orders.[7] In its twenty-seven years, the Commission has made over 100,000 decisions relating to development per-

5. Proposition 20; *see* California Coastal Commission website, *at* http://www.coastal.ca.gov/whoweare.html (last visited Sept. 15, 2003) (describing the history and mission of the California Coastal Commission).

6. Cal. Pub. Res. Code §30300 (1996).

7. Cal. Pub. Res. Code §§ 30510-30514, 30600, 30601-30627, 30809-30811 (1996).

mits.[8] As of October 1, 2003, there were twenty-three appeals of Commission decisions pending review in trial and appellate courts in California.[9] Several of the cases pending before the trial courts were brought after the appellate court's decision in *Marine Forests Society* but involve appeals of offers to dedicate that were finalized many years ago.[10] These decisions will be blocked by the Coastal Act's statute of limitations. Only two cases currently pending reached the appeals court before *Marine Forests Society* was decided.[11]

B. *The Ruling: Separation of Powers under the California Constitution*

The California state constitution establishes that "[t]he powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others."[12] Recognizing that the purpose of this doctrine is to diffuse power amongst the three branches and prevent any one branch from aggrandizing too much power, the court has "struck down provisions of law that either accrete power to a single branch" or that "undermine the authority and independence of one" of the branches."[13]

In *Marine Forests Society*, the court of appeals held that the Commission's appointment structure violated the separation of powers doctrine because it put an agency of the executive branch under "the control of the Legislature."[14] The legislature had nearly unfettered power to appoint eight out of twelve of the Commission's members; the legislature had completely unfettered power to remove a majority of members;[15] and there were "no safeguards or checks" to

8. Br. for Pet'r at 58, Marine Forests Soc'y v. Cal. Coastal Comm'n, No. S113466 (Cal. filed April 9, 2003).

9. Telephone Interview with Joseph Barbieri, Deputy Att'y Gen. for California (Sep. 15, 2003); Com. Note for Judicial Record Ex. A, Marine Forests Soc'y v. Cal. Coastal Comm'n, No. S113466 (Cal. filed April 9, 2003).

10. *See e.g.* Balkanski v. State Coastal Conservancy, Monterey Superior Court No. M59080 (offer to dedicate made in 1980); *see also* Rubinroit v. Cal. Coastal Comm'n, Los Angeles County Superior Court No. BC279373 (offer to dedicate made in 1988).

11. *See e.g.* Encinitas Country Day Sch. v. Cal. Coastal Comm'n, 4th District Court of Appeal, Division 1, No. D038323; Harvey v. Cal. Coastal Comm'n, 1st District Court of Appeal, Division 2, Nos. A100063, A100656.

12. CAL. CONST., Article III, §3.

13. Marine Forests Soc'y v. Cal. Coastal Comm'n, 104 Cal. App. 4th 1232, 1240 (2002) (quoting Carmel Valley Fire Prot. Dist. v. State 25 Cal. 4th 287, 297 (2001)).

14. *Id.* at 1246.

15. *Id*. at 1246; Cal. Pub. Res. Code §30312(a) (prior to Feb 20, 2003).

ensure the Commission's fidelity to the executive branch.[16] All of this added up to the Legislature's having "excessive control" over the Commission, and resulted in the Commission's "improper subservience to the legislative branch."[17] The court of appeals therefore concluded that the Commission's appointment structure "materially infringes upon the inherent authority . . . and independence of the agency."[18]

Balancing the power of the three branches of government is a fundamental tenet of our federal Constitution as well as of the California constitution. In the case of the Commission, the separation of powers violation would give the legislature the power not only to declare the law, but also to enact and to enforce it through the Commission's quasi-judicial functions.[19] This would allow the Legislature to inappropriately usurp the executive branch's power.

C. *The Fix: Assembly Bill 1X*

On February 20, 2003, less than two months after the court of appeals' ruling in *Marine Forests Society*, the governor of California signed a bill to fix the Commission's appointment structure so that it would no longer violate the separation of powers doctrine.[20] Assembly Bill 1X, which took effect on May 22, 2003, eliminates the Legislature's power to remove Commissioners and instead imposes a four-year term limit on Commission members.[21]

Nevertheless, this change addresses just one of the three problems that the court of appeals identified. The legislature still has the power to appoint a majority of members, and there are no safeguards to ensure the Commission's fidelity to the executive branch. The language of the court of appeals' ruling made it clear that it was impermissible to have all three of the violations it noted[22] but did not clarify

16. *Marine Forests Soc'y,* 104 Cal. App. 4th at 1248, 1252 (stating that the legislature had, "virtually unfettered authority over the appointment of a majority of the Commission's members, and wholly unfettered power to remove those members at the will of the Legislature").

17. *Id*. at 1248.

18. *Id*. at 1245.

19. Marine Forests Soc'y v. California Coastal Comm'n, 104 Cal. App. 4th 1232, 1241 (2002).

20. Cal. Pub. Res. Code §30312(a)(2) (1996); *see also* Bill Number ABX2 1 at California Bill Information, *at* http://www.leginfo.ca.gov/bilinfo.html (last visited Nov. 11, 2003).

21. Cal. Pub. Res. Code §30312(a) (1996) ("A person appointed by the Senate Committee on Rules or by the Speaker of the Assembly and qualified for membership because he or she holds a specified office as a locally elected official shall serve a term of four years.").

22. Marine Forests Soc'y v. Cal. Coastal Comm'n, 104 Cal. App. 4th 1232, 1252 (2002).

whether it would be permissible to have just two. The Supreme Court of California has agreed to address the issue of whether this change in appointment structure rectifies the breach of the separation of powers doctrine[23] and thus will determine whether Commission decisions made after May 22, 2003 are valid. Whether or not the court decides that the Commission's structure is valid in the future, the court will have to decide whether the Commission's past decisions are still valid.

III. RETROACTIVITY DOCTRINE

A. *Introduction*

Generally, judicial decisions are retroactive and legislative decisions are non-retroactive.[24] The rationale behind this dichotomy is that judicial decisions are declaring an absolute and unchanging law, while the legislature is constantly reacting to a changing society. The legislature reacts to temporal changes but the law transcends time. Despite this general rule, courts have recognized, as the legislature does, that sometimes the law changes with the times. When a new judicial decision overrules a previous rule on which the public has relied, it is unfair to treat that the new rule as if it had always been the law. This recognition of the potential unfairness of retroactivity has caused both federal and California courts to allow exceptions to the general rule of retroactivity. Nevertheless, different courts have come up with different methods of deciding whether an exception is appropriate in a particular case. This inconsistent treatment makes it difficult to predict when a court will apply a decision retroactively and when it will not.

B. *Options in Retroactive Application*

Not only is it difficult to determine whether a court will make its decision retroactive, but there are even more intricate application options. A court might decide to make a decision applicable under various schemes, those being: (1) only cases on pending review; (2) ex-

23. Supreme Court grant of permission to review, in docket entries for docket #S113466, *at* http://appellatecases.courtinfo.ca.gov (last visited Sep. 15, 2003) ("Does the February 20, 2003 amendment to Public Resources Code section 30312 eliminate the separation-of-powers defect found by the Court of Appeals, or is the composition of the California Coastal Commission still vulnerable to a separation-of-powers challenge?").

24. United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.") (citations omitted).

clude cases in which the trial has already started; or (3) applicable only to the parties before the court and not to other past actions. Below is a summary of the different ways that courts might apply a new decision.

1. Common Law Retroactivity.

Common law retroactivity completely erased the former state of the law and replaced it with the new rule. All past actions could be relitigated under the new rule. All decisions made under the previous rule, whether made by a court or by a commissioner, were treated as nonexistent.[25]

In *Marine Forests Society*, common law retroactivity would mean that all decisions made by the Commission in the past twenty-seven years would officially never have happened. All permits conveyed would be null and void. People who had developed their property pursuant to Commission permits would no longer have the permission thus granted. Commission-acquired easements for public beach access would cease to exist. No city plans approved by the Commission would retain approval. All of these parties would have to appeal to the new Commission or to some other government body to redetermine their rights.

2. Modern Retroactivity.

Most recent Supreme Court cases assume that a retroactive decision applies only to past actions that are not blocked from appeal by *res judicata* or statute of limitations. A new judicial rule applies to future actions, to the case before the court when it makes its ruling, to all cases still pending, and to all other past actions that have neither exceeded the applicable statute of limitations nor received a final decision. The Supreme Court takes as given that decisions blocked from appeal by *res judicata* will still be blocked even if a new decision is applied retroactively.[26]

In *Marine Forests Society*, modern retroactivity would mean that all Commission decisions that have already been challenged and received a final judgment in court could not be reappealed under a separation of powers claim. In addition, any final Commission deci-

25. Norton v. Shelby County, 118 U.S. 425, 442 (1886).

26. James B. Beam Distilling Co. v. Georgia, 501 U.S 529, 541 (1991) (holding that "once suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed").

sions that were not appealed within the sixty-day statute of limitations could not be challenged under a separation of powers claim.

3. Limited Retroactivity.

California courts have sometimes found that some cases call for specially tailored retroactivity.[27] The court makes a special delineation regarding which past actions should be decided under the old rule and which under the new rule. In one case in which there were many cases on the same issue already on trial, the court ruled that its decision should apply only to those cases in which trial had not yet begun.[28] In another case involving conversion of wetlands, the court held that its new decision should only apply to properties that were still recoverable.[29] In formulating special limited retroactivity for the MFS case, the court might decide that all Commission decisions which are final but not yet acted upon are eligible for appeal.

4. Non-retroactivity: Selective Prospectivity.

Selective or modified prospectivity applies a new judicial rule to the parties before the court and to all future claims. This means that the past action before the court is the only past action that will be subject to the new rule. All other past actions, including those still pending on review, must be decided pursuant to the old rule. The United States Supreme Court criticized this approach for not treating similarly situated parties similarly.[30] The Court then rejected selective prospectivity as an option at the federal level holding that once a decision has been applied to the parties before the court, that decision must be applied to all similarly situated parties.[31]

In *Marine Forests Society*, the court of appeals has already applied its decision to the Marine Forests Society. The United States Supreme Court would hold that this ruling necessitates retroactivity. Nevertheless, the California Supreme Court does not have to follow

27. Li v. Yellow Cab Co, 13 Cal. 3d 804 (1975); City of Berkeley v. Superior Court, 26 Cal. 3d 515 (1980).

28. *Li*, 13 Cal. 3d at 829.

29. *City of Berkeley*, 26 Cal. 3d at 533-534.

30. Harvey v. Virginia Department of Taxation, 509 U.S. 86, 95 (1993) (stating, "selective application of new rules violates the principle of treating similarly situated parties the same" (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)).

31. James B. Beam Distilling v. Georgia, 501 U.S. 529, 540-44 (1991) (holding that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. . . Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. . . . When the Court has applied a rule of law to the litigants in one case it must do so with respect to all others.").

federal precedent, so it could still choose to utilize selective prospectivity. This would allow the California Supreme Court to apply a decision of unconstitutionality to the MFS and to any claimants from future decisions of the Commission, but not to any other parties to past actions of the Commission.

5. Non-retroactivity: Pure Prospectivity.

Pure prospectivity applies a new judicial rule only to claims arising after the court's ruling is made final. All actions that occurred before the ruling, including claims pending on review and the claim before the court, must be decided under the old rule. This approach assumes that the previous rule was the legal reality until the new judicial decision changed that reality. Consequently, all decisions made under the previous rule were legal at the relevant time and continue to be so.

The *de facto* officer doctrine is a form of prospectivity; it gives validity to the decisions made by an officer even when a court later finds a legal defect with that officer. Like non-retroactivity, this doctrine seeks to maintain stability by not disrupting a status quo that was accepted and relied upon. The doctrine applies mainly to cases where an officer's defect was "technical" [32] and caused no substantive harm to those who relied on his or her decisions.

In *Marine Forests Society*, prospective application of a ruling of unconstitutionality would mean that only Commission decisions made after the California Supreme Court's ruling could be challenged on a separation of powers basis. No past decisions could be challenged. Similarly, the *de facto* officer doctrine would validate all past Commission decisions up until the date of the California Supreme Court ruling and protect them from collateral attack on separation of powers grounds. If the court holds that the Commission's new appointment structure, as created by AB 1X, passes separation of powers muster, then no Commission decision would be challenged because AB 1X took effect on May 22, 2003 and thus all Commission decisions since that date would be valid.

As discussed in the "Modern Retroactivity" part above, retroactive decisions are typically limited by *res judicata* and applicable statutes of limitations. The "History" part below broadly discusses retroactivity and non-retroactivity, leaving *res judicata* and statutes of limitations to be discussed in a later section. For the purposes of this

32. Ryder v. United States, 515 U.S. 177, 180 (1995) (quoting 63 Am. Jur. 2d, Pub. Officers and Employees § 578 (1984)).

Note, a retroactive decision is one that applies to past actions, including past actions still pending on review at the time of the decision. A non-retroactive decision is one that does not apply to past actions, including those pending on review and the one immediately before the court.

C. *History of Retroactivity in the United States and California Supreme Courts*

Under common law, all judicial decisions were given full retroactive effect.[33] The philosophic justification for this tradition was the belief that the law is an absolute truth and exists independently of mere mortals' interpretation of it; when a court makes a decision, it is not creating the law, but discovering the true law as it has always been. [34] This "declarative" theory was most famously expressed by Blackstone, who said that the duty of the court is not to "pronounce a new law, but to maintain and expound the old one."[35] Justice Cardozo explained that this "ancient dogma" means that an overturned rule will be viewed as never having existed, and the new rule will be assumed to have been the law all along. [36] The United States Supreme Court has slowly, but not steadily, moved away from this common law retroactivity. For the past decade the Court has supported the modern view of retroactivity, applying its decisions to past actions as long as they are not blocked by *res judicata* or statutes of limitations. The California Supreme Court has also had an uneven history regarding retroactivity, but has leaned generally toward non-retroactive application.

The United States Supreme Court made its most famous statement of the common law retroactivity doctrine in the 1886 case of *Norton v. Shelby County*.[37] There, it held that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inop-

33. Linkletter v. Walker, 381 U.S. 618, 622 (1965) (stating, "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future. . . . 'Judicial decisions have had retrospective operation for near a thousand years.'" (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (dissenting opinion of Holmes, J.)).

34. *See* John Chipman Gray, The Nature and Sources of the Law 222 (1st ed. 1909).

35. 1 WILLIAM BLACKSTONE, COMMENTARIES 69.

36. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 365 (1932) (holding, "a discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.").

37. Norton v. Shelby County, 118 U.S. 425, 442 (1886).

erative as though it had never been passed."[38] In other words, an unconstitutional statute was never a statute at all.

Interestingly, this very case, which is often cited as expressing the unforgiving common law rule of complete retroactivity, was also one of the first to delineate an exception to that rule in the form of the *de facto* officer doctrine. The *de facto* officer doctrine gives validity to the acts of officers holding a legal office, no matter what "defects there may be in the legality of their appointment or election."[39] The doctrine upholds all past decisions of an officer who seemed to be a legally sanctioned officer at the time, even though a later judicial ruling holds that he or she did not have the legal authority to make those decisions.[40]

The purpose of the *de facto* officer doctrine is to maintain the stability and authority of the government.[41] Revoking official decisions at a later date because of a "technical"[42] problem with an officer's appointment would create confusion and hardship for those who had relied upon that decision. Additionally, if every citizen who was unhappy with an official decision could collaterally attack the officer's right to office, chaos might result. [43] The *de facto* officer doctrine is thus "founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby."[44]

Although the United States Supreme Court explained the purpose of the *de facto* officer doctrine in *Norton*, it held that the doctrine did not apply in that case. The county court had created a board of commissioners, and the board had then undertaken official acts such as issuing bonds. The Supreme Court decided that the county court did not have the authority to create the board of commissioners, so the board had, in essence, never been created. Rather than using the *de facto* officer doctrine to accord validity to the acts of the commissioners, the court reasoned that "the act attempting to create the office of commissioner never became a law, the office never came into existence" and "there can be no officer . . . if there be no office to

38. *Id.*

39. *Id*. at 441.

40. *Id*. at 441-44 (explaining that if an officer "is clothed with the insignia of the office," then his or her "authority is to be respected and obeyed").

41. See Kathryn A. Clokey, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV 1121, 1131 (1985).

42. Ryder v. United States, 515 U.S. 177, 180 (1995).

43. *Id*. (explaining that this would disturb the "orderly functioning of the government.").

44. *Id*.

fill."[45] The *de facto* officer doctrine only applies when the office itself is legal, and the defect is with the officer. If the office itself is unconstitutional, the *de facto* officer doctrine is irrelevant. The Court recognized the necessity for an exception to common law retroactivity, but ultimately relied on Blackstone's belief in absolute legal truth.

While the United States Supreme Court was just beginning to entertain the idea that reliance interests are real even when a statute or an office theoretically is not, the California Supreme Court was facing the issue squarely. In 1898, twelve years after the United States Supreme Court's strong statement of common law retroactivity in *Norton,* the California Supreme Court made an equally strong statement in favor of non-retroactivity. After holding that a law setting the salaries of justices of the peace was unconstitutional, the California Supreme Court then held that that decision should not apply to past actions taken under the old law. When a justice of the peace who had been paid at the now unconstitutional rate brought suit to be paid under the new rule, the court said that "[t]he understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern."[46] The court made its decision non-retroactive because to do otherwise "would lead to the most mischievous consequences" and put the community in the "miserable condition" of never knowing when their affairs might be overturned by a new judicial rule.[47]

California courts showed the same concern for consistency and stability of official decisions in their use of the *de facto* officer doctrine at the beginning of this century. In upholding the acts of trustees who were not properly appointed to office, the California Supreme Court held in *Town of Susanville v. Long* that the acts of an officer *de facto* are "as valid and binding" as if he were an officer *de jure.*[48] The court held that expecting third parties to investigate the intricacies of every officer's title to office before accepting their official decisions would "lead to endless confusion."[49] California appellate courts followed the state Supreme Court's lead and invoked the *de facto* officer doctrine in the following years in two other cases.[50]

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45. Norton v. Shelby County, 118 U.S. 425, 441 (1886).

46. Cooley v. County of Calaveras, 121 Cal. 482, 486 (1898).

47. *Id*.

48. Town of Susanville v. Long, 144 Cal. 362, 365 (1904).

49. *Id*.

50. *See* Oakland Paving Co. v. Donovan, 19 Cal. App. 488 (1912); People v. Elkus, 59 Cal. App. 396, 407 (1922).

Although California courts were using the *de facto* officer doctrine around the turn of the century, it was not until well into the Twentieth century that Blackstone's philosophy began to yield to John Austin's philosophy in the United States Supreme Court. Austin maintained that judges "do something more than discover the law; they make it."[51] This philosophy leads to the conclusion that "rules which are later overruled are not erased, but are as an existing judicial fact until overruled, and intermediate cases finally decided under it are not to be disturbed."[52] This shift from retroactivity and toward prospectivity was motivated by practical, not just philosophical, concerns. The reliance interests of those who have lived according to a later-overturned rule of law make it difficult to pretend that such a rule never existed.

The United States Supreme Court first recognized the option of prospective application of a judicial decision in the 1932 case *Great Northern Railway v. Sunburst Oil & Refining Co*.[53] In that case, the Supreme Court did not apply its own rule prospectively, but upheld the Supreme Court of Montana's decision to apply a commission decision solely prospectively, thus allowing the state government to avoid paying a refund to shippers who had paid at rates that were later declared invalid. Although the United States Supreme Court noted that states had always had the right to apply decisions only prospectively,[54] this was the first time the Supreme Court specifically acknowledged that a state is not required to follow common law and Supreme Court precedent in the realm of retroactivity and "may make a choice for itself between the principles of forward operation and that of relation backward."[55] The Court's rationale for allowing

51. Linkletter v. Walker, 381 U.S. 618, 624 (1965).

52. *Id*. (explaining, "Austin maintained that judges do in fact do something more than discover the law; they make it interstitially by filling in with judicial interpretation the vague, indefinite or generic statutory or common-law terms that alone are but the empty crevices of the law. Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision it is considered as an existing judicial fact until overruled, and intermediate cases finally decided under it are not to be disturbed.").

53. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

54. *Id.* at 364 (stating, "[a state] may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . [N]ever has doubt been expressed that it *may* so treat them if it pleases.").

55. *Id*. (stating, "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward"); *cf*. McKesson Co. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990)(listing both retrospective and prospective state tax repayment schemes upheld by the Court.).

prospective application of judicial decisions was that it is sometimes necessary in order to avoid "injustice and hardship" to those who had relied on the old rule.[56]

Having recognized non-retroactivity as a legitimate option for state courts, the United States Supreme Court then exercised that option in 1940 in *Chicot County Drainage District v. Baxter State Bank*. By allowing the state not to pay bonds which had been cancelled, but whose cancellation had later been deemed unconstitutional, the Court recognized that "the past cannot always be erased by a new judicial declaration" and that "an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."[57] The Court continued to move away from the doctrine of retroactivity by declaring in 1956 that "[w]e should not indulge in the fiction that the law now announced has always been the law."[58]

In *Linkletter v. Walker* in 1965 the United States Supreme Court again referred to the "hardship" that could fall on those who relied on the state of the law before a new judicial decision.[59] The court specifically addressed the common law issue by saying that "[t]he Blackstonian view . . . was out of tune with actuality." [60] Until *Linkletter*, the Supreme Court had recognized only that non-retroactivity is an option, but had not set out guidelines for how to decide whether to apply a new rule retroactively or non-retroactively. In *Linkletter*, the Court set out a framework for making this decision, saying: "[W]e must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[61] The United States Supreme Court and all levels of California courts have since utilized these three factors as an informal guide to their retroactivity decisions.

In *Stovall v. Denno*, the Supreme Court restated the *Linkletter* factors and formed them into a tripartite test.[62] The Court held that, in determining whether to apply a new rule retroactively, a court must

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56. *Great Northern*, 287 U.S. at 364.

57. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

58. Griffin v. Illinois, 351 U.S. 12, 26 (1956).

59. Linkletter v. Walker, 381 U.S. 618, 625 (1965) (quoting *Great Northern*, 287 U.S. at 364).

60. *Id.* at 624. "[T]he Blackstonian view . . .was out of tune with actuality largely because judicial repeal ofttime did 'work hardship to those who (had) trusted its existence.'" (quoting Cardozo, Address to the N.Y. Bar Assn., 55 Rep.N.Y. State Bar Assn. 263, 296—297 (1932)).

61. *Id.* at 629.

62. Stovall v. Denno, 388 U.S. 293, 297 (1967).

look at "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[63] The Court then grouped these factors together to create the second prong of a different tripartite test in *Chevron Oil v. Huson* in 1971.[64] This new test first undertook the threshold question of whether a new rule was being created, then looked at the three factors already described, and finally weighed them to determine whether "substantial inequitable results" would occur if the rule were applied retroactively.[65] However, the Supreme Court never embraced this test strongly. Just two years later, in *Lemon v. Kurtzman*, the Court espoused the importance of non-retroactivity for protecting reliance interests, but did not mention the other two *Chevron Oil* factors.[66]

Even as the United States Supreme Court was formulating these tests and embracing non-retroactivity, the California Supreme Court seemed to take a step back toward following common law with limited exceptions for very specific reliance interests. In a 1957 decision, the California Supreme Court restated the common law, saying that overruled decisions never were the law.[67] It then noted that an exception to this rule is recognized when "contracts have been made or property rights acquired." [68] Since the parties in that case had not ac-

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63. *Id*.

64. Chevron Oil v. Huson, 404 U.S. 97 (1971).

65. *Chevron Oil*, 404 U.S. at 108 (1971) (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)). "First, the decision to be applied nonretroactively must establish a new principle of law . . .; Second, . . . 'we must weight the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation' . . .; Finally, . . .where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Id*. at 106-08 (citations omitted).

66. Lemon v. Kurtzman, 411 U.S. 192, 203 (1973) ("It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy.").

67. County of Los Angeles v. Faus, 48 Cal. 2d 672, 680-81 (1957) ("It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the former decision was bad law but that it never was the law.")

68. *Id*. at 680-81

> It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the former decision was bad law but that it never was the law. A well-recognized exception to this general rule is that, where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of

quired any such rights, the court held that the exception was not relevant and thus applied its decision retroactively. California continued to pay homage to common law by repeating, in 1989, that the "general rule that judicial decisions are given retroactive effect is basic in our legal tradition."[69] It again recognized an exception to that rule in the "compelling" reliance interests of a party who "has acquired a vested right or entered into a contract based on the former rule."[70] Because no such interests arose in the case, the court applied its ruling retroactively.

Despite this slip away from non-retroactivity, the court made its most renowned use of the *de facto* officer doctrine during this period. In *Plan for Bunker Hill v. Henry Goldman*, a party unhappy with a commission decision challenged the commissioner's right to office because he was not a resident of the requisite county when he took office.[71] The plaintiff argued that because this commissioner's vote had been the deciding one and he was not a valid commissioner, the commission decision was not valid. The court held that he was a *de facto* member of the commission, so collateral attacks on his actions were impermissible.[72] The office itself was valid, so his actions within that office could not be challenged.

Around the time of the California Supreme Court's use of the *de facto* officer doctrine in *Bunker Hill*, the United States Supreme Court employed the doctrine in *Glidden v. Zdanock*,[73] an Article III violation case, and in *Buckley v. Valeo*,[74] an Appointments Clause violation case. In the first, the Court gave *de facto* validity to the decisions of a supposed Article III panel that consisted illegally of non-Article III judges.[75] In *Buckley*, the Court held that the Election Commission's appointment structure violated the Appointments

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construction adopted in subsequent decision. Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision. *Id.*

69. Newman v. Emerson Radio Corp, 48 Cal. 3d 973, 978 (1989).

70. *Id*. at 989.

71. Plan for Bunker Hill v. Henry Goldman, 61 Cal. 2d 21 (1964).

72. *Id.* at 42 ("The right of a de facto officer to an office cannot be collaterally attacked.").

73. Glidden Co. v. Zdanock, 370 U.S. 530 (1962).

74. Buckley v. Valeo, 424 U.S. 1 (1976).

75. *Glidden*, 370 U.S. at 535. "[I]n other circumstances involving judicial authority this Court has described it as well settled 'that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto*, and binding upon the public.' The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." (quoting McDowell v. United States, 159 U.S. 596, 602 (1895)).

Clause, but nonetheless gave the commission's decisions "*de facto* validity."[76] Not only did the United States Supreme Court validate all past actions of the commission, it also put a stay on its holding of unconstitutionality so that the commission could continue to act until Congress had time to remedy the Appointments Clause violation.

The United States Supreme Court continued this trend of letting past actions stand unchallenged by using its *Chevron Oil* tripartite test in two plurality decisions in 1982[77] and 1990.[78] However, the Court then began looking more favorably at retroactivity again and declared that any decision which had already been applied to the parties before it should automatically apply to all similarly situated parties who had not already received a final judgment.[79]

Even though *Buckley* had upheld past actions of a commission despite an Appointments Clause violation in 1976, twenty years later the United States Supreme Court decided that such a violation demanded retroactive relief. In *Ryder v. United States*, a 1995 decision, the United States Supreme Court rejected both *Chevron Oil* and the *de facto* officer doctrine by deciding to apply its decision retroactively.[80] In that case, a court had acted as an Article III court even though two of its three members had been appointed by an agency rather than an executive. The Court held that the Article III court's composition violated the Appointments Clause. Because there had been a "trespass upon the executive power of appointment"[81] and because that power serves the important purpose of being a "bulwark against one branch aggrandizing its power at the expense of another branch,"[82] the reliance concerns of the *de facto* officer doctrine and of

76. *Buckley*, 424 U.S. at 142 (1976).

77. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

78. American Trucking v. Smith, 496 U.S. 167 (1990).

79. *See* Beam Distilling v. Georgia, 501 U.S. 529, 543 (1991) (stating that, "[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all other who might seek its prospective application. . . . [W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*."); *see also* Harper v. Virginia Board of Taxation, 509 U.S. 86, 97 (1993) (explaining that, "[w]hen this court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule").

80. Ryder v. United States, 515 U.S. 177, 184-85 (1995) (observing that, "whatever the continuing validity of [*Chevron Oil*] after [*Harper*], there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play.").

81. *Id.* at 182 (quoting McDowell v. United States, 159 U.S. 596,598 (1895)).

82. *Id*.

Chevron Oil were not important enough to overcome the need for retroactive relief. It is important to note that this decision was not simply an anomalous departure from *Buckley*; the United States Supreme Court made a similar holding using similar reasoning in 2003.[83]

California, however, has not followed the United States Supreme Court in this recent trend towards retroactivity. In the past few decades the California Supreme Court has continued to embrace *Stovall's* three-factor test when making non-retroactive decisions.[84] The court has also expanded beyond the *Stovall* factors of reliance, purpose, and administration of justice to consider the nature of the change.[85] In some recent non-retroactive cases, the court did not enumerate all of these factors but referred simply to "compelling reasons of fairness and public policy."[86]

D. *The California Court's Analysis*

California courts most often take the following approach when deciding whether to make a decision retroactive: First the court must make the threshold determination of whether a new rule of law has been established.[87] If there is a new rule, then the court must determine whether "fairness and public policy"[88] dictate that its decision be applied non-retroactively. In determining the dictates of fairness and public policy, the court is attempting to avoid "injustice and hard-

83. Nguyen v. United States, 123 S. Ct. 2130 (2003).

84. Donaldson v. Superior Court, 35 Cal. 3d 24, 38 (1983) (holding that "the California courts define retroactive effect of that decision under the tripartite test based on *Stovall v Denno*"); *see also* People v. Guerra, 37 Cal. 3d 385, 401 (1984) (holding that "California courts decide whether to make such an exception by weighing the three factors summarized in *Stovall v. Denno*").

85. Woods v Young, 53 Cal. 3d 315, 330 (1991) (holding that "[p]articular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule.") (citations omitted).

86. *See* Smith v. Rae-Venter Law Group, 29 Cal. 4th 345, 372 (2002) (holding that "considerations of fairness and public policy may require that a decision be given only prospective application"); *see also* Adoption of Kelsey v. Rickie M., 1 Cal.4th 816, 851 (1992) (recognizing that exceptions to the rule of retroactivity may sometimes be justified for "compelling reasons of fairness and public policy").; *see also* Buttram v. Fiberglas Corp 66 Cal. Rptr. 2d 438, 532 (1997) (stating that "it may be unfair to change the rules of the game in the middle of a contest").

87. *Donaldson*, 35 Cal. 3d at 36.

88. Newman v. Emerson Radio Corp, 48 Cal. 3d 973 (1989); *Rae-Venter*, 29 Cal. 4th at 372 (2002).

ship" [89] to those who reasonably relied on the old rule,[90] to preserve the orderliness of society and to prevent the chaos of constant appeals of official decisions.[91] In order to evaluate these concerns, the court examines (1) the reasonableness of parties' reliance on the old rule; (2) the nature of the change and purposes served by the new rule; and (3) the effect that retroactivity will have on the administration of justice.[92] These factors help the court determine whether a non-retroactive application would make more sense in terms of individual fairness and societal order.

1. New Rule of Law

As discussed above, before proceeding with a retroactivity analysis the California Supreme Court must first make a "threshold" determination that its ruling will establish a "new standard or a new rule of law."[93] A decision that represents a "clear break with the past"[94] or that "disapproves a practice this Court has arguably sanctioned in prior cases" will be considered a new rule.[95]

The California Supreme Court has never explicitly ruled that the California Coastal Commission is constitutional, so a new ruling of unconstitutionality would not be a direct turnaround. However, in twenty-seven years of frequent litigation against the Commission, the constitutionality of the Commission's appointment structure has

89. Great Northern Ry. Co.. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932); Chevron Oil v. Huson, 404 U.S. 97, 107 (1971); Cipriano v. City of Houma, 395 U.S. 701 (1969).

90. *Great Northern*, 287 U.S. at 364; *Chevron Oil*, 404 U.S. at 107; *Cipriano*, 395 U.S. 701.

91. Ryder v. United States, 515 U.S. 177, 180 (1995). ("'The *de facto* doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by enduring the orderly functioning of the government despite technical defects in title to office.'" (quoting 63A Am.Jur.2d, Pub. Officers and Employees § 578, pp. 1080-1081 (1984)).

92. *See* Smith v. Rae-Venter Law Group, 29 Cal. 4th 345, 372 (2002) (stating that, "Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule" (quoting Woods v. Young, 53 Cal. 3d 315, 339 (1991))); *see also* Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 983 (1989) ("A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the 'hardships' imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases.").

93. Donaldson v. Super. Ct., 35 Cal. 3d 24, 36 (1983).

94. *Id.* at 37 (quoting Desist v. United States, 394 U.S. 244, 248 (1964)).

95. *Id*.

never been challenged. Thus, California courts arguably have sanctioned the Commission's validity as an executive agency. If the California Supreme Court upholds the court of appeals' ruling of unconstitutionality, it will consider that to be a new rule and will go on to consider the other factors listed above.

2. Reliance

The interests of parties who reasonably relied on an old rule are probably the most important factor in the retroactivity decision. Concern for "hardship" on those who reasonably relied was one of the first reasons that the United States Supreme Court allowed non-retroactivity, [96] and it has continued to be a major concern of the Court. [97] In *Chevron Oil*, the Supreme Court found the petitioner's reliance interests to be overriding. Petitioner had relied on the current state of the law which allowed him more than a year in which to bring his suit. Unexpectedly, the United States Supreme Court made a new rule that changed the applicable law so that the statute of limitations was only one year long and petitioner's claim would be barred. The court pointed out that "[t]he most [petitioner] could do was rely on the law as it then was" and it would be unfair to conclude that he had "waived" his rights.[98]

Although California does not couch its own concerns about retroactivity in terms of hardship, it shares the United States Supreme Court's view that changing the rules after the game has been played might be unfair to those who had no reason to suspect that the rules might change. In 1997, the California Supreme Court reasoned that it may be "unfair" to "substantially modif[y] a legal doctrine on which many persons may have reasonably relied."[99] In that decision, the California Supreme Court blocked parties from bringing torts claims based on a new definition of joint and several liability, holding that the old definition would be valid for all claims arising before their ruling. In a different case in 2002, the California Supreme Court changed the legal definition of what comprises a successful appeal. The petitioner before the court had reasonably relied on the previous

96. *See* Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932) (explaining that a new rule may be non-retroactive "whenever injustice and hardship will thereby be averted").

97. *See,* American Trucking v. Smith, 496 U.S. 167, 169 (1990) (explaining that, in civil cases, non-retroactivity is often used for the purpose of avoiding "injustice or hardship to civil litigants who have justifiably relied on prior law.").

98. Chevron Oil v. Huson, 404 U.S. 97, 107 (1971).

99. Buttram v. Fiberglas Corp., 66 Cal. Rptr. 2d 438, 532 (1997).

definition when he brought his appeal, so the court held that it would be unfair to apply the new definition to him and made its ruling non-retroactive.[100]

Reliance on judicial definitions is generally an important factor in deciding whether to make a decision non-retroactive. But reliance on property or contract rights comprises a particularly "compelling" subcategory of reliance interest.[101] When these rights have been acquired under the old rule, California courts are very "reluctant to apply [their] decisions retroactively."[102] The California Supreme Court has stated that when "contracts have been made or property rights acquired . . . it has been the rule to give prospective, and not retrospective, effect to the later decision."[103] One California court of appeals has taken this argument to the extreme holding that not only are contract and property rights a very important interest, but also they are the only valid interest so far as retroactivity is concerned. That court held that if no such rights have vested in the parties, then there is no reason for non-retroactivity.[104]

The California Coastal Commission decisions currently being appealed in reaction to the court of appeals ruling are (1) objections to permitting decisions cease and desist orders and (2) offers to dedicate easements. All of these involve property rights, and therefore fall into the category of especially protected reliance interests. The United States Supreme Court pointed out the importance of the reliance interests of property owners with permits and offers to dedicate from the Commission when it held that its ruling of unconstitutionality in *Nollan v. California Coastal Commission* should not be retroactive.[105] The Commission decisions currently pending are being brought by the recipients of the permits, but a retroactive decision would open up the possibility that neighbors of people who received permits from the Commission could challenge those decisions. This could substantially impact property owners who had relied on Commission decisions. The reliance factor, possibly the most important factor in the

100. Smith v. Rae-Venter Law Group, 29 Cal. 4th 345, 372 (2002).

101. Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 989 (1989); *see also* Cooley v. County of Calaveras, 121 Cal. 482, 485 (1898). (explaining that, "no subsequent decision of a court can create a mistake and annul a previous contract which was legal and valid when made").

102. *Newman*, 48 Cal. 3d at 989.

103. County of Los Angeles v. Faus, 48 Cal. 2d 672, 680 (1957).

104. *See,* Cummings v. Morez, 42 Cal. App. 3d 66, 74 (1974) (stating that, "no vested rights hav[e] attached to any of the parties").

105. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

California Supreme Court decision, will weigh heavily against a retroactive decision in the MFS case.

3. Purpose of New Rule

The California Supreme Court will also consider the purpose of the new rule[106] and whether retroactive application will further this purpose. New rules meant to provide additional protection to parties are often considered equally important for past and future litigants and therefore are applied retroactively. New rules that make substantive changes in the law are also considered too important to be temporally limited and are more likely to be made retroactive than those that make only procedural changes. Often, new procedural rules are meant to deter certain behaviors, and past occurrences of that behavior cannot be changed. Therefore, retroactive application would not have the desired effect, and the new rule is made non-retroactive. However, if a procedural change would preclude parties from any chance at relief, that change will sometimes be applied non-retroactively.[107]

New torts rules have been considered to impart protections whose importance outweighs reliance interests for those who assumed no such protections existed. For this reason, California courts almost always apply new torts rules retroactively.[108] In these cases, the new ruling gave new protections for plaintiffs in tort actions. The purpose of additional protection would be furthered for future as well as for past parties. The interests of those who relied on an old rule were not important compared to the important protections to be afforded those who were injured.

Just as in new torts rules, new criminal laws are often meant to expand "procedural protections" for the benefit of the defendant.[109] The United States Supreme Court has reasoned that expanded procedural protections are important enough to warrant a "per se rule of

106. Woods v. Young, 53 Cal. 3d 315, 330 (1991).

107. *Id*. ("'Retroactive application of an unforeseeable procedural change is disfavored when such application would deprive a litigant of "any remedy whatsoever'" (quoting Chevron Oil v. Huson, 404 U.S. 97, 108 (1971))).

108. *See* Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 981-82 (1989) (observing that, "[w]ith few exceptions and even after expressly considering suggestions to the contrary, California courts have consistently applied tort decision retroactively even when those decisions declared new causes of action or expanded the scope of existing torts in ways defendants could not have anticipated prior to our decision").

109. American Trucking v. Smith, 496 U.S. 167, 169 (1990) (distinguishing the importance of retroactivity in criminal procedural protections from the lesser interest of injustice or hardship to civil litigants).

retroactivity."[110] In *Robinson v. Neal*, the United States Supreme Court held that a new rule protecting a defendant's right not to stand trial twice for the same crime was such an important protection that it should be applicable to both past and future actions. The Court thus made its decision retroactive.[111]

In other cases, courts have held that retroactivity will not further the purpose of new procedural protections. The Supreme Court reasoned in *Linkletter* that the purpose of rules excluding improperly collected evidence is to deter lawless police action, and because the police misconduct has already occurred, a retroactive application would not remedy the harm already done.[112] The California Supreme Court paralleled this reasoning when it held that, because "the purpose of the exclusionary rule . . . is to deter illegal conduct by law enforcement officials, exclusion of evidence seized prior to the announcement of a decision does not further compliance with that decision."[113]

In another case in which retroactivity did not make sense, the court articulated a new rule, changing the definition of a successful appeal in order to deter frivolous appeals. Appeals that had already been brought could not suddenly be deterred by retroactive application of the new rule, so the California Supreme Court made its decision non-retroactive.[114]

In the MFS case, the purpose of the new rule is to prevent the Legislature from aggrandizing power from the Executive. Although this is a very important purpose for protecting the public in general, it is not necessarily important for protecting the parties before the court. There is no reason to think that a Commission with a different appointment structure would not have served a cease and desist order

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110. *Id*.

111. Robinson v. Neal, 409 U.S. 505 (1973).

112. Linkletter v. Walker 381 U.S. 618, 636, 639-40 (1965) ("We cannot say that this purpose (deterring lawless police action) will be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved. . . .[T]hough the error complained of may be fundamental it is not of the nature requiring us to overturn all final convictions based upon it.").

113. Donaldson v. Superior Court, 35 Cal. 3d 24, 39 (1983) (citations omitted).

114. Smith v. Rae-Venter Law Group, 29 Cal. 4th 345, 373 (2002) (observing that the purpose of the statute is "to discourage frivolous, meritless, and costly appeals from the commissioner's decisions to the courts. That important objective would not be served by retroactively applying the new rule to appeals already filed and pending in the superior courts, nor will it be compromised by prospective application of our decision. Accordingly, our holding today will be applied prospectively only to those appeals from the commissioner's decisions and awards filed in the trial court after the date this decision becomes final.").

to the MFS. The court's purpose of upholding California's separation of powers doctrine would not be undermined by a non-retroactive decision and those subject to decisions by the unconstitutional commission would not suffer from a lack of protection, as would potential plaintiffs in torts cases. If the California Supreme Court makes its decision retroactive, the Commission's cease and desist order against the MFS will stand.

4. Administration of Justice.

The California Supreme Court has sometimes interpreted the administration of justice factor to be a question of whether a retroactive decision would prevent justice from being carried out. In *Woods v. Young*, the court held that its decision should be non-retroactive because a retroactive decision would block many cases from being brought and this would not serve justice.[115] More often, courts interpret this factor as being a question of how retroactivity will effect the efficient functioning of the court system. If the judicial system will be flooded with appeals because of a retroactive decision, courts will often decide to make decisions non-retroactive.

In *Stovall*, the United States Supreme Court decided that making its decision retroactive would be devastating to the administration of justice because it would disrupt "the processing of current criminal calendars."[116] The Court held that a criminal defendant must have counsel present during any identification procedures, but it did not allow previously convicted defendants who did not have counsel present at their identification proceedings to bring suit.

In making a new rule regarding contributory negligence in 1975, the California Supreme Court held that there were so many cases on the same issue then pending review that it should to limit the retroactivity of the new decision in order to limit the confusion in the courts.[117] In 2002, the California Supreme Court made a new rule that,

115. Woods v. Young, 53 Cal. 3d 315, 330-31 (1991) ("Concern for the administration of justice further supports prospective application. Medical malpractice is one of the more common tort actions; therefore, we anticipate that many pending cases will be affected by our decision. Justice is not served by barring so many actions that reasonably appeared timely when filed.").

116. Stovall v. Denno, 388 U.S. 293, 300 (1967) (noting that impact on administration of justice would be more than devastating. "At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted.").

117. Li v. Yellow Cab Co, 13 Cal. 3d 804, 829 (1975) (holding that "in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that rule of limited retroactivity should obtain here.").

similarly, would affect all appeals that had been filed in reliance on the old rule.[118] The court reasoned that this potential for disruption of the administration of justice supported non-retroactive application of the new rule.[119] In contrast, a recent United States Supreme Court decision held that a retroactive decision that would affect only seven to ten cases then pending could be made retroactive with little risk of great disruption to the administration of justice.[120]

Clearly, there is no magic number of potential appeals that constitute an impermissible disruption of the administration of justice. The possibility of a large number of appeals has been enough to push both the California and United States Supreme Courts towards non-retroactivity, while seven to ten cases have not been enough. In the MFS case, the Commission has made over 100,000 permit decisions in its twenty-seven year history. Invalidation of these decisions would certainly constitute a devastating disruption to the California court system. However, if retroactivity were limited by the statute of limitations on Commission decisions, the number of potential appeals would be reduced to less than twenty-three,[121] thus diminishing the concern for the administration of justice. Nonetheless, these cases would still have an impact on the court system, so the potential impairment to the administration of justice is not negligible.

IV. LIMITING FACTORS

A. *Statutes of Limitations and Res Judicata*

Under common law retroactivity, the old rule was erased and all decisions made under it could be appealed no matter when or how a decision had been made. The United States Supreme Court noted that "once suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed."[122] Even a new ruling of unconstitutionality cannot reopen litigation that would

118. *Smith*, 29 Cal. 4th at 373 ("[Retroactive application] would stand to affect all pending appeals from the commissioner's decisions that were filed in the superior court in reliance on the former rule.").

119. *Id*.

120. Ryder v. United States, 515 U.S. 177, 185 (1995) (stating "there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play. The parties agree that the defective appointments of the civilian judges affect only between 7 to 10 cases pending on direct review.").

121. Com. Note for Jud. Rec Ex.A, *Marine Forests Soc'y v. Cal. Coastal Comm'n*, No. S113466 (Cal. filed April 9, 2003).

122. Beam Distilling v. Georgia, 501 U.S. 529, 541 (1991).

otherwise be closed by *res judicata.*[123] California has held for many decades that there must be a limit on how long a claim, even a constitutional claim, can be justiciable.[124] By 1987, a California court of appeals was so sure of this limitation that it stated that "it is well settled that the assertion of a constitutional right is subject to a reasonable statute of limitations,"[125] and then went on to say that "in California when a court or agency acts pursuant to a statute later declared unconstitutional, prior final proceedings based on such a statute are entitled to *res judicata* effect and are immune from collateral attack."[126]

The United States Supreme Court also agrees that a party who would otherwise be blocked by *res judicata* is still blocked even after a new ruling of unconstitutionality. Such a ruling does not open the door for claimants whose claim has already been heard, even though a new ruling of unconstitutionality does raise a new claim. In *Chicot County v. Baxter State Bank*, the United States Supreme Court ruled that a lower court's cancellation of bonds was unconstitutional. It held that this ruling should be retroactive and the government should be required to pay the bonds that had been unconstitutionally cancelled. However, the petitioner before the Court had been a party to the lower court's ruling canceling the bonds, so their claim was now barred by *res judicata* and the government did not have to pay their bonds.[127] Even though other bondholders could claim payment under the United States Supreme Court's retroactive decision, the petitioner was barred from such a claim by *res judicata*.

In denying the reassertion of a torts claim that had been decided before a statute was declared unconstitutional, the California Supreme Court said that "[e]ven where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief."[128] In other words, even though the claim that the statute is now unconstitutional is a new claim that was not available when the parties originally brought suit, those parties still get only one opportunity to litigate over their injury.

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123. *See* Bank of America v Dep't of Mental Hygiene, 246 Cal. App. 2d 578, 585 (1966) (holding that, "[t]he rule appears clear in California that a judgment which was contrary to the Constitution because it was based upon a statute later held invalid, is nevertheless res judicata in a subsequent suit").

124. *See* Panos v. Great W. Packing Co., 21 Cal. 2d 636, 637 (1943) (stating that, "[p]ublic policy and the interests of the litigants alike require that there be an end to litigation").

125. Miller v. Bd. of Med. Quality Assurance, 193 Cal. App. 3d 1371, 1378 (1987).

126. *Id.* at 1379.

127. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

128. Slater v. Blackwood, 15 Cal. 3d 791, 795 (1975).

In the MFS case, all parties who have received a final decision from the Commission and not made a timely appeal will be blocked by *res judicata* from asserting a new claim on separation of powers grounds. Because the statute of limitations under the California Coastal Act is only sixty days, there existed a very small window in which valid claims against the Commission could have been made.

B. *Finality of Agency Decisions*

In California, administrative agency decisions are *res judicata* against future collateral attacks,[129] and the statute of limitations for a valid appeal starts to run from the date of the final agency decision.[130] In striking down an adoption statute for violating the constitutional guarantee of equal protection, the California Supreme Court held that a final decision made by an adoption agency would not be overturned even by a retroactive court decision.[131] Similarly, California court of appeals decisions regarding the Commission itself emphasized that unappealed agency decisions are immune from collateral attack.[132]

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129. *See* Cal. Coastal Comm'n v. Super. Ct., 210 Cal. App. 3d 1488, 1500 (1989) (observing that, "[t]he line of California cases previously cited dealing with the preclusive effect of a final unreviewed administrative decision generally speak of the plaintiff being collaterally estopped to contest issues resolved against him in the administrative proceeding"); *see also* Adoption of Kelsey v. Rickie M., 1 Cal. 4th 816, 851-52 (1992) (holding that, "[o]ur decision shall therefore have no effect in adoption proceedings in which a final judgment has been entered. Such judgments cannot be challenged either directly or collaterally."); Miller v. Bd. of Med. Quality Assurance, 193 Cal. App. 3d 1371, 1379 (1987) (explaining that "in California when a court or agency acts pursuant to a statute later declared unconstitutional, prior final proceedings based on such a statute are entitled to *res judicata* effect and are immune from collateral attack").

130. *See* Patrick Media Group, Inc. v. Cal. Coastal Comm'n, 9 Cal. App. 4th 592, 608 (1992) (holding that "[f]ailure to obtain judicial review of a discretionary administrative action by a petition for a writ of administrative mandate renders the administrative action immune from collateral attack").

131. *Adoption of Kelsey*, 1 Cal. 4th at 851-52 ("Of course, even retroactive decisions generally do not extend to cases in which final judgments have already been entered. . . . Our decision shall therefore have no effect in adoption proceedings in which a final judgment has been entered. Such judgments cannot be challenged either directly or collaterally.").

132. *See* Rossco Holdings, Inc. v. State, 212 Cal. App. 3d 642, 660 (1989) (explaining that, "[plaintiffs'] action must be reviewed by petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack."); Cal. Coastal Comm'n v. Super. Ct., 210 Cal. App. 3d 1488, 1500 (1989) (requiring review in an administrative mandate action when there was no theoretical or practical barrier to such review); Patrick Media Group, Inc. v. Cal. Coastal Comm'n, 9 Cal. App. 4th 592, 608 (1992) (explaining that, "[f]ailure to obtain judicial review of a discretionary administrative action by petition for a writ of administrative mandate renders the administrative action immune from collateral attack, either by inverse condemnation action or by any other action.").

The California Coastal Act requires that a party file a petition for writ of mandamus within sixty days of a Commission decision, or else that party's claim will be barred.[133] If the party does not file a petition within those sixty days, the agency decision will then serve as *res judicata* and be "immune from collateral attack."[134] California case law on Commission decisions makes it clear that, once the statute of limitations has run, the commission decision is "good as against the world." [135] The decision is valid even against a ruling of unconstitutionality.

If the California Supreme Court holds that the new appointment structure as put into effect by AB 1X is valid under the separation of powers doctrine, then all Commission decisions made after May 22, 2003 are undeniably valid. Because final Commission decisions are protected by *res judicata* and statutes of limitations, only appeals filed within sixty days of a decision are valid. This means that, even if the court makes its decision retroactive, only timely cases currently on appeal would be affected. Fewer than twenty cases, including the Marine Forests Society case itself, would be affected by a retroactive ruling of unconstitutionality in the MFS case.

V. DE FACTO OFFICER DOCTRINE

If the court chooses to use the *de facto* officer doctrine, all other considerations of retroactivity in the MFS case would be moot. In order to utilize the doctrine, the court must answer two questions in the affirmative: (1) Does the doctrine apply in this case? (2) Do we want to use it?

In deciding whether the *de facto* officer doctrine applies in the MFS case, the main question the court will have to answer is whether there was a *de jure* office to be filled. Some, but not all, jurisdictions have held that when an office is created by an unconstitutional statute, there is no *de jure* office to fill so the incumbent cannot be considered a *de facto* officer.[136] Such was the reasoning that led the

133. Cal. Pub. Res. Code § 30801 ("Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final".).

134. *Rossco Holdings*, 212 Cal. App. 3d at 660.

135. Ojavan Investors, Inc v. California Coastal Comm'n, 26 Cal. App. 4th 516, 525 (1994).

136. *See* Carnegie Inst. of Med. Lab. Technique, Inc. v. Approving Auth. for Sch. for Training Med. Lab. Technologists, N.E.2d 225, 228 (1965) (holding that members of an Approving Authority for Schools for Training Medical Laboratory Technologists were not *de facto* officers when a bill involving their approval of a school was a nullity). *But see* Matter of Stock-

United States Supreme Court to reject the *de facto* officer doctrine in *Norton v. Shelby* in 1898. In that case, the Court held that because the very creation of the commission was unconstitutional, the commission never existed as a valid office.

Nevertheless, after nearly 100 years of careful consideration, the same Court passed over the *de jure* office problem without so much as a comment in *Buckley*. The facts in *Buckley* were very similar to the facts in the MFS case. Congress, not by the president, appointed four of the six members of the election commission, even thought it was executive agency. The Court held that this violated the Appointments Clause but then not only granted *de facto* validity to the Commission's past acts, but also allowed the Commission to continue functioning for thirty days while Congress found a way to remedy the violation.[137]

In a more recent case involving an Appointments Clause violation, the United States Supreme Court held that the purpose of the Appointment Clause is so important that a petitioner's right to challenge a violation should not simply be waived via the *de facto* officer doctrine.[138] The Court has also reached conflicting decisions about the appropriateness of the *de facto* doctrine for Article III violations. In *Glidden,* the Court granted *de facto* authority to the decisions of non-Article III judges.[139] But in *Nguyen,* the Court concluded that a panel consisting of two Article III judges and one Article IV judge was such

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well, 622 P.2d 910, 913 (Div. 1 1981) ("Until a statute has been declared unconstitutional, an officer acting under the statute possesses such color of title as to render him an officer *de facto*.").

137. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (ordering a, "stay, for a period not to exceed 30 days, (of) the Court's judgment insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act.").

138. Ryder v. United States, 515 U.S. 177, 182 (1995) (explaining that, "[t]he [Appointments] Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" (quoting Freytag v. Commissioner, 501 U.S. 868, 878 (1991))).

139. Glidden Co. v. Zdanock, 370 U.S. 530, 535 (1962) ("[I]n other circumstances involving judicial authority this Court has described it as well settled 'that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.' The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." (quoting McDowell v. United States, 159 U.S. 596, 602 (1895))).

a grave violation that the panel's decision should not be granted *de facto* validity.[140]

One court of appeals overlooked the *de jure* office requirement and granted *de facto* validity to the past actions of city councilors even though the charter establishing the City Council was unconstitutional.[141] Other than this, all other California cases using the *de facto* officer doctrine have not had to resolve the issue of whether there is a *de jure* office to fill because they dealt with a valid office and a defective officer.[142]

United States Supreme Court precedent is conflicted on the issue of whether the *de facto* officer doctrine is applicable when the statute creating the office is unconstitutional. California precedent is sparse, but indicates that the court might still find the doctrine applicable.

If the California Supreme Court decides that the *de facto* officer doctrine is applicable, it must then decide whether it wants to employ it. Although the doctrine could apply to any court ruling invalidating the decisions of a government official, courts have chosen not to apply it even when it was a viable option. They have chosen instead to use a non-retroactivity analysis. For example, the United States Supreme Court in *Northern Pipeline* quoted *Buckley* in order to grant a stay of its holding that a court was unconstitutional, but did not refer to *Buckley*'s use of the *de facto* officer doctrine.[143] Instead, the Court used its *Chevron Oil* test to make the decision non-retroactive. In *Lemon*, the Court recognized the importance of reliance interests of those who relied on seemingly legal official decisions, but it invoked

140. Nguyen v. United States, 123 S. Ct. 2130, 2137 (2003) (stating that, "Congress' decision to preserve theArt. III character of the courts of appeals is more than a trivial concern)."

141. *See* People v. Elkus, 59 Cal. App. 396, 407 (1922) (stating that '[h]aving been elected and acting under color of legal authority, the defendants were and are *de facto* officers whose official acts, within the scope of their authority as defined by the charter, are and will continue to be valid").

142. *See* Plan for Bunker Hill, 61 Cal. 2d 21 (1964) (holding that the agency was valid but one commissioner was not a resident of the requisite county when he took office); Susanville v. Long, 144 Cal. 362 (1904) (holding that the trustees were not properly appointed); Oakland Paving Co. v. Donovan, 19 Cal. App. 488 (1912) (holding that the replacement superintendent of streets was appointed by the board of public works instead of by the mayor).

143. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) ("It is plain that Congress' broad grant of judicial power to non-Article III bankruptcy judges presents an unprecedented question of interpretation of Article III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively.").

the principles of non-retroactivity rather than the *de facto* officer doctrine in validating the past actions of those officers.[144]

California has consistently held that agency decisions, even when made pursuant to a statute later ruled unconstitutional, are final decisions and are protected by *res judicata*. California courts have often used the non-retroactivity doctrine to preserve past agency decisions,and have not used the *de facto* officer doctrine. For example, in *Miller v. Board of Medical Quality Assurance,* the California Supreme Court held that although the agency had acted according to an unconstitutional statute, its prior decisions were immune from collateral attack. In upholding past decisions, the court never mentioned the *de facto* officer doctrine.[145] In *Adoption of Kelsey*, the California Supreme Court preserved past actions of the agency, but never referred to the *de facto* officer doctrine.[146]

Despite the striking similarity between the facts in *Buckley* and the facts in this case, it is unlikely that the California Supreme Court will choose to use the *de facto* officer doctrine. The reasons for the *de facto* officer doctrine are very similar to the reasons for non-retroactivity. In deciding whether non-retroactivity is appropriate, the court also decides whether the *de facto* officer doctrine is appropriate. However, there is a somewhat rigorous method for deciding whether to use the retroactivity doctrine, while there is very little method to deciding whether to use the *de facto* officer doctrine. Therefore, courts feel more justified in making a decision non-retroactive, and the effect is the same. This helps explain why the *de facto* officer doctrine has been used so sparingly, especially by the California Supreme Court.

VI. CONCLUSION

Although the *de facto* officer doctrine is probably applicable and provides a clean and easy solution to the court's retroactivity dilemma, it is unlikely that the court will use the doctrine. Courts have avoided that course of action, preferring instead to employ the more developed analysis of retroactivity. It is thus unlikely that the Califor-

144. Lemon v. Kurtzman, 411 U.S. 192, 209 (1973). "[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful."

145. Miller v. Bd. of Med. Quality Assurance, 193 Cal. App. 3d 1371, 1379 (1987) (holding that, "an administrative agency does not act without fundamental jurisdiction or in excess of its jurisdiction when it acts pursuant to the authority of a statute later declared unconstitutional").

146. Adoption of Kelsey v Rickie M., 1 Cal. 4th 816 (1992).

nia Supreme Court will use the *de facto* officer doctrine in the MFS case for only the second time in eighty years. The court will look instead to the more abundant case law on retroactivity.

Although the retroactivity doctrine is more developed than the *de facto* officer doctrine, its history is inconsistent. In the past decade, United States Supreme Court decisions have shown a preference for retroactivity, limited by *res judicata* and statutes of limitations. California courts have continued to follow the outdated United States Supreme Court practice of balancing reliance interests, the purpose of the new rule, and the effect on administration of justice against the common law presumption of retroactivity of judicial decisions. In the MFS case, the substantial reliance concerns of parties who have acquired the right to develop their property through Commission decisions, combined with the lack of a direct injury to be remedied by the new rule and the potential impact on the administration of justice, weigh heavily in favor of non-retroactivity.